UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM SMALLWOOD, et al., Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	: : : : : : : : :	CASE NO. 1:15-CV-00336-SJD JUDGE: SUSAN J. DLOTT

REPLY IN SUPPORT OF
BANK OF AMERICA'S MOTION TO DISMISS

Plaintiffs William Smallwood's and Golda Smallwood's (collectively "Plaintiffs") Complaint (Dkt. No. 1) fails to state a claim against Bank of America ("BANA") under the Real Estate Settlement Procedures Act ("RESPA"). In their opposition to BANA's motion to dismiss [Dkt. No. 6] (the "Opposition"), Plaintiffs misconstrue to this Court Bank of America's ("BANA") motion to dismiss [Dkt. No. 5] (the "Motion") and the requirements under RESPA for servicers to respond to Qualified Written Requests ("QWRs"). RESPA only requires an investigation and identification of why an account is correct or why the requested information cannot be provided. The exhibits to the Complaint clearly demonstrate that BANA met this requirement for each QWR. Further, BANA responded to each request, despite the fact that the only error identified and several of the information requests did not relate to the servicing of Plaintiffs' loan. Finally, the Opposition further confirms that Plaintiffs have not identified any actual damages caused by the BANA's Responses to the QWRs. For these reasons, outlined more fully below, and those discussed in BANA's Motion, Plaintiffs' Complaint must be dismissed with prejudice.

I. PLAINTIFFS MISSTATE BANA'S ARGUMENT AND BANA MAINTAINS IT PROPERLY RESPONDED TO THE QWRS.

Throughout the Opposition, Plaintiffs assert that BANA has admitted that it did not properly respond to the QWRs. This is incorrect.[1] In fact, BANA's Motion specifically outlines that it did properly respond to the QWRs. *See* Motion Section B (titled "BANA Adequately Responded To The QWRs"). BANA has adequately responded to each QWR attached to the Complaint, whether or not BANA was required to respond.[2] Plaintiffs' Opposition makes it clear that Plaintiffs simply are not satisfied with BANA's responses; however, this is not a basis for relief under RESPA. BANA provided adequate information to the borrower, and exceeded its burden under the statute.

As stated in its Motion, RESPA requires a response to a QWR to either: 1) make corrections; 2) investigate and explain why the account is correct; or 3) investigate and provide the borrower a written explanation of why the information cannot be obtained or provided. Based upon the facts in the Complaint and the Exhibits to the Complaint, BANA provided an adequate response for each specific request.

Plaintiffs' Complaint and the attached Exhibits demonstrate that BANA identified why it believed Plaintiff's account was accurate. The February and April QWRs request information regarding BANA's review of Plaintiffs for a loan modification in 2013 and the appeal of the same. The Responses to these QWRs were specifically tailored to the borrower and provide contact information for BANA's Home Retention Division, the reason the loan was denied for a loan modifications and that the appeal period for the April 8, 2013 decision had passed. *See* Compl. Exs. P, S. *See also Refroe v. Nationstar Mortgage, LLC*, S.D. Ala. No. CIV.A. 14-314-CG-M, 2015 WL 541495, at *5 (Feb. 10, 2015) ("Under RESPA, Nationstar is not required to give a response that is desired by or satisfies Plaintiff, but is merely required to 'provide a statement of its reasons,' which Nationstar did") (granting motion to dismiss). BANA's April Response stated that "the Loan was not declined due to a [net present value] determination" and specifically outlined that it was determined that Plaintiffs' income would not support a modified payment on terms BANA was able to offer Plaintiffs. See Compl. Ex. S. Plaintiffs cannot assert RESPA claims for failure to properly respond to a QWR based on their disagreement with BANA's determination that the loan is correct after its investigation.

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[1] Throughout its Opposition, Plaintiffs make false assertions regarding BANA's position to this Court. For example, the Opposition states "BANA relies solely upon its position that loss mitigation has nothing to do with servicing a mortgage loan" (p.7) and "BANA admits that it made no effort to respond to the notice of errors or request information regarding the improperly underwritten loan modification" (p.10). BANA's Motion makes no such statements and in fact maintains that BANA has properly responded to each request from Plaintiffs. Plaintiffs' disagreement with BANA's loan modification determination in no way can be construed that BANA failed to properly investigate or respond to the QWRs.

[2] The Exhibits to the Complaint make it clear that Plaintiffs' only position is that its account is in error because BANA denied the loan modification application. *See e.g.* Complaint Exhibit K ("My clients believe their account is in error because it was improperly underwritten for a loan modification [.]").

The Complaint and the attached Exhibits also show that BANA reviewed the information and provided an explanation as to why no further response was required or why the requested information could not be provided. For example, the Response to the April QWR specifically stated that BANA had no record of Plaintiffs appealing the April 8, 2013 decision. Compl. Ex. S. Therefore, these documents could not be provided. Notwithstanding this, Plaintiffs argue BANA somehow is liable under RESPA for not providing documents it has stated it does not have. Additionally, BANA clearly notified Plaintiffs that it did not think any further correspondence was required under law or that some documentation sought is not available. *See* Compl. Ex. P. The Responses to the QWRs are proper, and Plaintiffs' claims are clearly distinguishable from cases where servicers were held to have not properly responded to QWR requests. *Compare Tamayo v. World Sav. Bank, FSB*, S.D. Cal. No. 08CV2287 JLS CAB, 2009

WL 8652543, at *2 (July 23, 2009) (denying motion to dismiss where plaintiff alleged no response was received to a proper QWR).

II. BANA IS NOT REQUIRED TO RESPOND TO REQUESTS REGARDING LOSS MITIGATION.

BANA in no way has admitted that any Response to the QWRs was inadequate, and instead responded to requests that it was not required to under RESPA. In fact, the majority of Plaintiffs' specific requests fall outside of proper QWR requests as they do not relate to servicing of the loan. As Plaintiffs point out, servicing is defined as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan." 12 U.S.C. § 2605(i)(3). Plaintiffs argue that BANA's reliance on *Van Egmond* is misplaced, yet cite no authority that the review of a loss mitigation application—which would create a *new* loan—relates to the servicing of a loan. Notably, neither *Van Egmond* nor any other case cited in BANA's Motion have been overturned, and federal courts continue to hold that loss mitigation reviews are not servicing of a loan. *See Mbakpuo v. Civil Wells Fargo Bank, N.A.*, D. Md. No. RWT-13-2213, 2015 WL 4485504, at *8 (July 21, 2015) ("Mbakpuo's requests for a loan modification did not relate to the servicing of a loan because they did not relate to Wells Fargo 'receiving any scheduled periodic payments from a borrower pursuant to the terms of a loan'") (citing 12 U.S.C. § 2605(i)(3)); *see also Mayer v. EMC Mortgage Corp.*, N.D. Ind. No. 2:11-CV-147, 2014 WL 1607443, at *5 (Apr. 22, 2014) ("A servicer's denial of a permanent loan modification and any actions related to any loan modification are outside the term 'servicing', and thus cannot be pursued under RESPA").

Granting BANA's Motion would not create the parade of horribles outlined in the Opposition. Instead, permitting this claim to go forward permits borrowers to bring claims under RESPA for an impermissible reason where they merely disagree with the reason they were denied a HAMP modification. BANA has provided the information requested to Plaintiffs and stated that the account is not in error. Borrower's RESPA claim against BANA for allegedly failing to respond to valid QWRs cannot be maintained on these facts.

III. THE OPPOSITION FURTHER DEMONSTRATES PLAINTIFFS HAVE NOT SUFFERED DAMAGES.

Plaintiffs assert in their Opposition that they have suffered damages from the alleged RESPA violations, yet include nothing more than a conclusory statement that damages exist. Again, Plaintiffs have not identified any allegations that they have suffered actual damages caused by BANA's Responses to the QWRs.

VI. CONCLUSION.

BANA identified for Plaintiffs three times why it did not believe their account was in error and why any other requested information was not provided. BANA's response is proper and meets the RESPA requirements. Therefore, for the reasons stated in this Reply and in BANA's Motion to Dismiss, the Complaint should be dismissed with prejudice as Plaintiffs have failed to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically on August 31, 2015. Notice was also sent by operation of the Court's electronic filing system to all other counsel who have entered an appearance and any parties who have entered an appearance through counsel. The parties may access this filing through the Court's ECF system.

/s/ David A. Wallace
One of the Attorneys for Defendant
Bank of America, N.A.